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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

PALM FINANCE CORPORATION, Plaintiff and Respondent, v. KENNETH J. ROBERTS, Defendant and Appellant.	B219391 (Los Angeles County Super. Ct. No. SC085646)

APPEAL from the judgment of the Superior Court of Los Angeles County. Joseph S. Biderman, Judge. Affirmed.

Philip D. Dapeer for Defendant and Appellant.

Hawley Troxell Ennis & Hawley and John F. Kurtz, Jr., for Plaintiff and Respondent.

Plaintiff Palm Finance Corporation (Palm) sued defendant Kenneth J. Roberts (Roberts) in 2005 to collect the unpaid balance due under a term note in the amount of $1,250,000. Roberts made his last payment under the note in 2001. Palm filed its lawsuit 21 days after the applicable four-year statute of limitations had expired. In response to

Roberts's affirmative defense of the statute of limitations, Palm amended the complaint to allege tolling of the statute of limitations pursuant to Code of Civil Procedure section 351 (section 351) due to Roberts's absence from the State of California for 21 days or more during the limitations period. In a bifurcated trial of the statute of limitations defense, the trial court found Roberts was absent from California for at least 21 days during the relevant period between the date of his last payment and the filing of the complaint, thus making timely the filing of the complaint. In the second phase of the trial, the court awarded Palm the full amount owing under the term note with accrued interest in the total amount of $4,677,920.96.

Roberts appealed, claiming section 351 is unconstitutional as applied to him because it deprives him of due process and equal protection and violates his right to travel in interstate commerce. He also contends that even if section 351 tolled the statute of limitations for 21 days, the complaint was still filed more than four years after the date he allegedly breached the term note. Roberts also contends the evidence at trial demonstrated it was unconstitutional to apply section 351 in this case, which we understand to be a claim that substantial evidence did not support the trial court's finding that the limitations period was tolled by his absence from the state. Finally, Roberts contends the court erred in awarding judgment for Palm on the term note because it was unconscionable and a contract of adhesion, not supported by consideration, and violates the federal Truth in Lending Act (15 U.S.C. § 1601 et seq.), which we also understand to be a claim that no substantial evidence supported the judgment.

We affirm, finding Roberts has failed to support any of his arguments on appeal.

BACKGROUND

The summary below of the procedural history of this lawsuit and the facts and legal conclusions found by the trial court in the bifurcated trial is drawn from portions of the trial court's two thorough statements of decision. Before turning to the statements of decision, we will briefly address section 351, the tolling statute that was the subject of the first trial on the statute of limitations defense.

Section 351 provides: "If, when the cause of action accrues against a person, he is out of the State, the action may be commenced within the term herein limited, after his return to the State, and if, after the cause of action accrues, he departs from the State, the time of his absence is not part of the time limited to the commencement of the action."

Section 351 has been held to violate the commerce clause of the federal Constitution when applied to a California resident like Roberts who is out of state for purposes of interstate commerce, but not when a California resident is out of state for other purposes unrelated to interstate commerce. (*Filet Menu, Inc. v. Cheng* (1999) 71 Cal.App.4th 1276, 1283 (*Filet Menu*) ["Because the implications of . . . section 351 for such travel apply equally to residents engaged in interstate commerce and to residents not so occupied, tolling statutory periods for the duration of out-of-state travel unrelated to interstate commerce does not violate the commerce clause"].) Since it was undisputed that Palm filed its complaint 21 days after the four-year statute of limitations expired, the purpose of the first trial was to determine if Roberts was out of state for at least 21 days during the limitations period for reasons not related to interstate commerce. We turn now to the trial court's first statement of decision issued after the trial of the statute of limitations defense.

1. Trial of the Statute of Limitations Affirmative Defense

"This lawsuit was filed by Plaintiff Palm . . . against Defendant [Roberts] on May 23, 2005 to collect the outstanding amounts due and owing pursuant to the Term Note ('Term Note D') executed by Roberts dated October 17, 1990 in the amount of $1,250,000.

"On December 22, 2006, Palm filed its Amended Complaint for Breach of Contract, which included a new paragraph alleging: 'Upon information and belief, Roberts has been absent from the State of California for more than a cumulative twenty (20) days between May 3, 2001 and May 23, 2005, thereby tolling the statute of limitations pursuant to Code of Civil Procedure § 351.' ('Relevant Period').

"At the final status conference, the Court bifurcated the issues of the statute of limitations asserted as an affirmative defense by Roberts to Palm's Amended Complaint

and the statute of limitations defense to Roberts's Cross-Claim raised as an affirmative defense by Palm from the remaining issues in this case. The issues of the statute of limitations were tried before the Court on May 6, 7, 8, and 9, 2008 and June 27, 2008.

"The parties stipulated at trial that the last payment of $2,500 on Term Note D was made by Roberts on May 3, 2001.

"The relevant statute of limitations for Palm's Amended Complaint for Breach of Contract is Code of Civil Procedure § 337, which is for four years.

"The partial payment of $2,500 on May 3, 2001 extended the accrual of the statute of limitations until May 3, 2001 pursuant to Code of Civil Procedure § 360.

"The date upon which the statute of limitations accrues is also extended by Code of Civil Procedure § 351." [¶] . . . [¶]

"Roberts testified that all of his travel outside of California was for business purposes (other than to attend his mother's funeral in New Jersey) and that he does not leave the State of California for any other purpose -- in fact, according to Roberts's testimony, virtually every day of his life during the Relevant Period was spent in business activities. When Roberts's testimony is viewed in conjunction with his financial records, the Court concludes that Roberts spent substantial time working on business endeavors, the bulk of which appear to have been in interstate commerce, during extended absences from California, and did so primarily in having [meetings] at various venues in other States or waiting for meetings to occur.

"Roberts identified 75-80 people with whom he claimed to have had business dealings outside of California. However, for more than half of the persons identified, Roberts identified only one meeting, lasting a few hours or less. For those with whom he met repeatedly, the testimony was clear that there were extended periods of time in the 507 days that Roberts was proven to be outside of California during which no meetings were taking place or business being conducted. Even if each meeting Roberts referenced lasted a full day, the Court finds that, based upon his description of the work involved, the general activities he relates to have been involved in could only have encompassed a

fraction of the amount of time he was outside of California. Certainly more than 20 days of the 500 were not spent in the facilitation of interstate commerce.

"Roberts's credibility was diminished by his testimony regarding Plaintiff's Interrogatory No. 16 which asked: 'For each day that you are certain you were in the State of California during the period from April 15, 2001 through May 23, 2005, please state the date and explain the basis for that belief.' Exh. 209 at p. 3. Roberts's response was 'Defendant has been in California for almost the entirety of the period referenced in the interrogatories. When defendant was absent from the State of California during the period of April 15, 2001 to May 23, 2005, it was for business purposes only.' Exh. 210, p. 2. The Court finds Roberts's response that he had been in California for almost the entirety of the period was false and Roberts knew or should have known it was false when made under oath.

"Roberts's answer to Interrogatory No. 22 was also false, wherein he stated that when he was absent from California he stayed at his New York residence, . . . inasmuch as Roberts testified to numerous trips to Nevada, Florida, and Washington, D.C.

"Roberts testified that he had a number of meetings outside of California over an extended period regarding what he claimed was a $3.0 million investment in a company named Funny Bagels. The Ledgers show that Roberts made a single purchase of 250,000 shares of Funny Bagels at $1.25 per share, for a total amount of $312,000 on August 10, 2001. However, there were no other purchases of stock during the Relevant Period shown in any of the other Ledgers.

"Roberts claimed that he traveled to New York to meet with designers and contractors for units 54B and 55B in Trump Tower; however, there was no evidence presented to support the conclusion that Roberts's involvement with those units involved the facilitation of interstate commerce. The limited planning and design work related to the renovation of those two apartments for later resale is inherently 'intrastate' commerce. Furthermore, the entries in the Ledger and the Special Accounts at U.S. Bank show that relatively small amounts were actually expended on design and contract work during the Relevant Period. The Ledgers show a limited amount of renovation activity in

2002 and no renovation activity during the remainder of the Relevant Period. Exhibits 184-188 [Account Nos. 1014 and 1502]. The Court concludes that well over [20] days of time that Roberts spent in New York during the Relevant Period were not spent in the facilitation of interstate commerce.

"Roberts claimed that he had meetings regarding a substantial investment in Big City Radio through Prime Charter; however, the Ledgers show that Roberts made a purchase of $472,419.41 of Big City Radio stock during the time period from February 8, 2001 [which predates the Relevant Period] through October 26, 2001. Exh. 184, p. 22. However, no other Big City Radio stock was purchased during the Relevant Period. Exhs. 184-188, Account No. 1313. Therefore, the Court concludes that the time Roberts testified that he spent negotiating the Big City Radio investment was not in the Relevant Period and, therefore, there are an additional [20]-plus days in the Relevant Period for which the out of state travel was not in the facilitation of interstate commerce.

"Roberts testified that he spent time meeting with persons to obtain a loan from Fundex secured by his California residence and his Trump Tower apartments. Roberts produced no documents supporting that testimony and there is no entry in the Ledgers that supports that testimony. Roberts initially testified that he had a number of meetings to obtain that loan throughout 2004. It is not credible that Roberts would have no documentation whatsoever of transactions, either finalized or interim, involving sums in the millions of dollars. Although Roberts does not have the burden of proof, his lack of documentation in a transaction involving millions of dollars casts doubt on the credibility of his testimony that the purpose of a significant amount of his travel was in the facilitation of interstate commerce.

"Roberts testified that he went to Washington D.C. to meet with Eric Bernthal, his lawyer with Latham &Watkins in Washington D.C, to deal with the potential purchase of a TV station in Laughlin, Nevada. However, the Ledgers, which do show expenditures for attorney fees to other law firms in Los Angeles during the Relevant Period, show no payments to Latham & Watkins or Eric Bernthal. Exh. 184-185, [Account No. 6620]. Moreover, the time period that Roberts visited Washington D.C. was long before he

testified that he first became involved with the Laughlin, Nevada TV station. This casts doubt on what Roberts has testified were several additional days of the Relevant Period wherein he states he was outside of California engaging in the facilitation of interstate commerce.

"Roberts testified as to one weekend and one holiday that he worked during the Relevant Period. The documents introduced into evidence in this case prove that Roberts was outside of California on a Saturday, Sunday or holiday for more than 162 days during the Relevant Period.

"Roberts was in Houston, Texas for five days in 2004, but testified that he did not recall conducting any business activity on those days.

"The Court further is doubtful of Roberts's credibility based upon Roberts's explanation of cash withdrawals of several thousand dollars on at least a weekly basis during much of the Relevant Period. Roberts testified that he did so in order to see what One Million Dollars looks like in cash, and that he then returned the funds to his accounts. There is no record of significant cash deposits reflecting that Roberts put the One Million Dollars back in his accounts after he had the opportunity to see what it looked like in cash. The story defies credulity, casting further doubt on all material aspects of Roberts's testimony.

"Roberts's testimony that he has no document to demonstrate that any or all of his travel was for business purposes and that he maintains no calendar or other log of his business appointments simply was not believable. The only documentary evidence in existence is credit card purchases, canceled checks [and] accounting ledgers. What this evidence proves, if anything, is that Roberts was out of the State of California for in excess of 500 days of the Relevant Period, during some of which days he testified that he had numerous meetings with over 75 individuals. Despite requests therefor, Roberts has not produced and the Court does not have in evidence any contracts, agreements, business plans, leases, agendas, minutes, calendars or e-mails which would reflect that any business activity was being conducted. The only reasonable inference from these exhibits and the testimony is that Roberts was out of the State of California for over

500 days, and there is proof by a preponderance of the evidence that he was not involved in the facilitation [of] any interstate commerce activity occurring for multiples of 21 days of such period.

"Application of the tolling provisions in CCP § 351 to Roberts in this case for more than [21] of the days that Roberts was absent from the State of California during the Relevant Period does not unconstitutionally impede Roberts's movements in the course of interstate commerce or otherwise violate the Commerce Clause of the United States Constitution or the right to travel. Roberts's argument that this impermissibly requires him to keep records of their interstate commerce activities is unpersuasive. Instead, Roberts's testimony that he was involved in numerous specific transactions for the duration of all of his out of state travel was not credible. When all of the evidence is considered, the Court concludes that Roberts was outside of the State of California for more than 21 days for other than the facilitation of interstate commerce."

2. Trial on the Merits

After the second trial on the merits, the trial court made the following findings of fact:

"From 1988 to 1995, Palm was licensed in California as a Commercial Finance Lender, and since 1995, Palm has been licensed as a California Finance Lender. Trial Exhibit 1.

"In 1990, Chairman of Palm, Steven C. Markoff ('Markoff') was originally approached by an attorney, Howard Sterling, about providing funds to facilitate Roberts's purchase of two Southern California radio stations, Ocean Broadcasting, Inc. ('OBI') and Radio Broadcasters, Inc. ('RBI'). According to an August 21, 1990 letter from Roberts to Markoff, Roberts had been 'consulting with Howard Sterling about various structures for a potential transaction' and asked Markoff to consider a proposal that included a proposed return extremely similar to what would later be referred to as the 'Facility Fee' in the Term Loan Agreement and Term Note D. Trial Exhibit 5. Despite Roberts's testimony that the structure of the transaction was not his idea, evidence presented at trial prove[d] the contrary and demonstrate[d] his involvement in structuring the transaction from the outset. Trial Exhibits 5, 8 and 11.

"The $1,250,000 Facility Fee ultimately loaned by Palm was used to make certain payments required under an Asset Purchase Agreement dated as of June 28, 1990, between Roberts, OBI and RBI ('Asset Purchase Agreement'). Trial Exhibit 11. The Facility Fee allowed Roberts to complete an acquisition of two radio stations that he told Palm would be worth more than $40 million when they were combined and operated together, thereby providing him with a substantial profit. Trial Exhibit 11.

"In the August 21, 1990 letter to Markoff outlining a proposal for a loan of up to $1,450,000 to be used to acquire the OBI and RBI assets, Roberts proposed that Palm would receive a payment of 100% of the total amount loaned, in addition to repayment of the principal amount of the loan plus interest if the acquisition of the OBI and RBI assets was completed and assigned to a third party or if the acquisitions closed without an assignment.

"The proposed loan transaction terms were also set forth in a letter to Markoff and Roberts dated August 31, 1990, from Roberts's attorneys, Manatt, Phelps & Phillips. Trial Exhibit 8. The terms of the loan were a maximum principal amount of $1,250,000 and interest at 10% per annum on the outstanding balance. Consistent with Roberts's proposal, the letter further provided in Paragraph 4 for 'additional compensation' if Roberts was successful in acquiring the radio stations in an amount up to a maximum of $1,250,000 million, as follows:

> "4. Additional Compensation. The Lender would be entitled to additional compensation as follows: Additional compensation in the maximum principal amount of $ 1,250,000 would be payable at the earliest to occur of the closing of the Asset Purchase (an 'Acquisition') or upon the assignment of the Asset Purchase Agreement in the event the rights of Roberts under the Assignment Agreement are assigned to a third party (an 'Assignment'). The actual amount of additional compensation will equal the amount actually funded by Lender as described in paragraph 1, above. Upon consummation of an Acquisition, additional compensation would be paid in the form of a promissory note of Roberts in the maximum principal amount of $1,250,000, upon which interest would accrue at the rate of 10% per year, all due and payable three years from the date of closing of the Asset Purchase. Upon an assignment, the maximum of $1,250,000 additional compensation will be paid by Roberts to the Lender in cash.

"The Term Loan Agreement incorporated the same terms that were set forth in Trial Exhibits 5 and 8. Trial Exhibit 18. Section 2.8 of the Term Loan Agreement specified:

> "2.8 Facility Fee. In consideration of the Lender's agreement to extend financial accommodations to the Borrower hereunder and under the Notes, the Borrower shall pay to the Lender a fee (the 'Facility Fee') in an amount equal to:
>
> "(a) in the event of the consummation of the Asset Purchase, or the transfer, sale, assignment, or other disposition of all or a portion of the Borrower's rights under the Asset Purchase Agreement, or the realization of a profit, directly or indirectly, by the Borrower from a sale or other disposition, in one or a series of transactions, of ten percent (10%) or more of the stock or assets of OBI or RBI, and
>
> "(i) in the event that the only loan made by the Lender pursuant to the terms of this Agreement is Term Loan A, Zero Dollars ($0);
>
> "(ii) in the event that the Lender makes Term Loan B to the Borrower but, for any reason, does not make Term [Loan] C to the Borrower (and irrespective of whether Term Loan A is made by the Lender to the Borrower), One Million Dollars ($1,000,000); or
>
> "(iii) in the event that the Lender makes Term Loan B and Term Loan C to the Borrower (and irrespective of whether Term Loan A is made by the Lender to the Borrower), One Million Two Hundred Fifty Thousand Dollars ($1,250,000); or
>
> "(b) in the event the Asset Purchase Agreement is terminated in any way prior to the consummation of the Asset Purchase, and
>
> "(i) in the event that the only Loan made by Lender pursuant to the terms of this Agreement is Term Loan A, Zero Dollars ($0);
>
> "(ii) in the event that the Lender makes Term Loan B to the Borrower (and irrespective of whether Term Loan A or Term Loan C is made by the Lender to the Borrower), Five Hundred Thousand Dollars ($500,000).
>
> "The Facility Fee shall be evidenced by and payable in accordance with the terms of Term Note D.

"On September 28, 1990, pursuant to the Term Loan Agreement, Palm made a loan advance to Roberts in the amount of $200,000, denominated 'Term Loan A.' Trial Exhibit

18. On October 17, 1990, Palm made a loan advance to Roberts in the amount of $1,000,000 for which he signed Term Note B. On that same day, Roberts also signed Term Note D, which provided for the payment of the Facility Fee in the amount of $1,250,000 conditional upon: (1) Palm loaning an additional $250,000 and (2) Roberts's success in acquiring the aforementioned radio stations. Trial Exhibit 26.

"On October 18, 1990, Roberts's attorneys, Latham & Watkins, sent an opinion letter to Palm stating in relevant part that, '[a]ssuming the due execution and delivery of the Loan Documents by the Borrower, the Loan Documents constitute [a] legal, valid and binding obligation of the Borrower, enforceable against the Borrower in accordance with their respective terms.' Trial Exhibit 31.

"On December 28, 1990, Palm made another loan advance in the amount of $250,000, which was evidenced by Term Note C. Trial Exhibit 33.

"Roberts used the loan advances from Palm, along with other funds, to successfully consummate the Asset Purchase Agreement and acquire the radio stations on or about April 19, 1991.

"As a result of the consummation of the Asset Purchase Agreement and the fact that Palm made Term Loan B for $1,000,000 and Term Loan C for $250,000, Term Note D required Roberts to pay the Facility Fee in the amount of $1,250,000 with interest accruing at 10% per annum. Pursuant to Term Note D, Roberts was allowed by Palm to make payments of $2,500 per month.

"Roberts made monthly payments of $2,500 from April 1991 until May 2001. However, because the interest was accruing at the rate of 10% per annum, and the payments were insufficient to be applied to any principal, the total amount owed by Roberts increased. On July 20, 1994, Roberts sent a letter to Markoff referencing a conversation between them on July 18, 1994 and requesting an extension of time to pay off the Facility Fee and the accrued interest thereon. That letter stated in relevant part:

> "Without belaboring the subject, I told you that we do not have the funds at this time to retire the obligation to Palm Finance. We need your help, understanding and most of all we need an

> extension. I have every intention of ultimately honoring my obligation, but due to circumstances that are not in my control, I need additional time to restructure and refinance.

"Trial Exhibit 55.

"With Palm's agreement, Roberts continued to make regular payments of at least $2,500 per month on the Facility Fee through May 3, 2001. Trial Exhibits 61 and 67A.

"At trial, Palm's Controller, Dennis Lautzenheiser, testified that as of March 31, 2009, Roberts owed Palm $4,677,920.96. Trial Exhibit 67A. In addition, interest continued to accrue at the rate of $1,072.02 per day after March 31, 2009. Trial Exhibit 67A.

"Lautzenheiser's unrefuted calculations were based on the following suppositions: the applicable interest rate was 10% per annum; all payments received were applied first to interest and then to principal; Roberts stopped making payments in May of 2001 constituting a default, invoking the default interest rate of 5% over the Bank of America reference rate pursuant to Section 3(c) of Term Note D; and interest was compounded monthly pursuant to Section 5 of Term Note D. The Court finds that Palm's suppositions and conclusions are accurate."

After making these extensive fact findings, the trial court then made the following thoughtful and thorough conclusions of law.

"The Term Loan Agreement and Term Note D establish that Roberts was obligated to pay the Facility Fee of $1,250,000 if two conditions were satisfied. First, Palm needed to make loan advances in the amount of $1,250,000 as specified in the Term Loan Agreement. The second condition was that Roberts needed to consummate the purchase of substantially all of the properties and assets of OBI and RBI. Both of these conditions were satisfied.

"First, Palm made two advances totaling $1,250,000 pursuant to the Term Loan Agreement and those funds were then used by Roberts to consummate the Asset Purchase Agreement, which occurred on or about April 19, 1991. Trial Exhibits 30 and 33. Second, Roberts successfully acquired the two radio stations on April 19, 1991. Trial Exhibits 42, 49, and 52.

"Roberts never contended that the terms of [the] Term Loan Agreement or Term Note D were unclear or ambiguous. Furthermore, there is no evidence that would support either conclusion.

"When the provisions of a contract are not ambiguous, the Court may not rewrite the contract for the parties. *Schleimer v. Strahl* (1963) 219 Cal.App.2d 613, 616; *In re Mission Ins. Co.* (1995) 41 Cal.App.4th 828, 837 (when the language of a contract is plain and unambiguous, it is not within the province of a court to rewrite or alter by construction what has been agreed upon). 'Ordinarily, one who accepts or signs an instrument, which on its face is a contract, **is deemed to assent to all its terms,** and cannot escape liability on the ground that he has not read it.' *Randas* v. *YMCA of Metropolitan Los Angeles* (1993) 17 Cal.App.4th 158, 163 (emphasis added); *Marin Storage & Trucking Inc., v. Benco Contracting and Eng'g, Inc.* (2001) 89 Cal.App.4th 1042, 1049.

"The obligation to pay the Facility Fee is clear and unambiguous in accordance with the Term Loan Agreement and Term Note D. Moreover, Roberts did not contend that he was unaware of that contractual obligation. In fact, it was Roberts who originally proposed the Facility Fee in his August 21, 1990 letter to Palm. Trial Exhibit 5. Furthermore, the undisputed evidence showed that Roberts made regular payments toward the Facility Fee from April 1991 through May 3, 2001, clearly manifesting his knowledge and assent that the payments were owed. Trial Exhibits 61 and 67A. With only a few exceptions, each check signed by Roberts clearly indicated that the payment was for 'Term Note D $1,250,000.' Trial Exhibit 61. The Term Loan Agreement and Term Note D obligate Roberts to pay the balance owed pursuant to Term Note D. The undisputed evidence presented at trial showed that as of March 31, 2009 the amount owed to Palm by Roberts was $4,677,920.96. In addition, interest continues to accrue at the rate of $ 1,072.02 per day after March 31, 2009 until Judgment is entered in Palm's favor." [¶] . . . [¶]

"Roberts asserts he should be awarded a judgment against Palm for the amount of payments made with respect to Term Note D based on four affirmative defenses to the validity and enforceability of the Term Loan Agreement and Term Note D. Roberts contends that both agreements: lacked consideration, violated the federal Truth in Lending Act and

were unconscionable as contracts of adhesion. He further alleges that the claims are barred by the statute of limitations. [¶] . . . [¶]

"Roberts argues that there was no consideration for the 'Facility Fee' and, therefore, this Court should not enforce Term Note D. Roberts's argument is based primarily upon the fact that Markoff did not know why the lawyers who drafted the Term Loan Agreement referred to the amount that Palm is seeking to collect as a 'Facility Fee.' The evidence proved otherwise.

"The 'Facility Fee' is expressly provided for in Section 2.8 of the Term Loan Agreement: The Facility Fee is '[i]n **consideration** of the Lender's agreement to extend financial accommodations to Borrower hereunder and under the Notes . . . .' (emphasis added). Section 2.8 further provides that 'in the event of consummation of the Asset Purchase' and 'in the event that [Palm] makes Term Loan B and Term Loan C,' the Facility Fee would be $ 1,250,000. Section 2.8 then provides that the 'Facility Fee shall be evidenced by and payable in accordance with the terms of Term Note D.' Trial Exhibit 18. Thus, the consideration is obvious on the face of the Term Loan Agreement.

"Pursuant to Cal Civ. Code § 1614: 'A written instrument is presumptive evidence of a consideration.' Furthermore, Cal Civ. Code § 1615 provides: 'The burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it.' Here, Roberts failed to present any evidence that would support the conclusion that there was no consideration for the Facility Fee.

"Roberts's reliance on Trial Exhibit 3, a memorandum sent to Roberts from Markoff on August 20, 1990, is misplaced. This memorandum was not intended to be a contract between the parties and the proposed terms set forth in that memorandum did not modify the terms of the Term Loan Agreement or Term Note D. A contract in writing supersedes all negotiations or stipulations concerning its subject matter. Cal Civ. Code § 1625. Additionally, the Term Loan Agreement contains a valid integration clause. Trial Exhibit 12." [¶] . . . [¶]

"Roberts argues that the entire transaction evidenced by Term Note A, Term Note B, Term Note C and Term Note D violated the federal Truth in Lending Act (15 U.S.C. §§ 1601-

1693r) and, particularly its 1994 amendments, the Homeowner's Equity Protection Act ('HOEPA'), which was implemented through Regulation Z (12 CFR § 226). Roberts claims that Palm violated HOEPA [15 U.S.C. §§ 1602(aa)(l)(A) and (B)] because the interest rate for Term Note D was in excess of 10% percent per annum.

"The truth is, the Truth in Lending Act does not apply to transactions, such as that between Palm and Roberts, involving extensions of credit primarily for business or commercial purposes. 15 U.S.C. § 1603(1). See 15 U.S.C. § 1603(3).

"The loans underlying this litigation were for the business purpose of purchasing two radio stations and not for any consumer purpose. The Truth in Lending Act does not apply to credit transactions for business or commercial purposes. *American Express Co. v. Koerner* (1981) 452 U.S. 233, 242 (holding that for the purposes of the Truth in Lending Act, an extension of consumer credit defines consumer as follows: the adjective consumer, used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family, household, or agricultural purposes); [*Weber v. Langholz*] (1995) 39 Cal.App.4th 1578, 1583 (for the Truth in Lending Act, 15 U.S.C. § 1601 et seq. to apply, a loan must be primarily for personal, family, or household purposes); *American Savings Association v. Conrath*, 462 N.E.2d 849, 853 (111. App. 1984) (holding that the creditor did not violate the Act because the credit transaction was for business and commercial transactions and the Act did not apply); *Quinn v. A.I. Credit Corp.*, 615 F.Supp. 151, 153 (E.D. Penn. 1985) ('[T]o qualify for the Act's protection, plaintiff must show the disputed transaction was "a consumer credit transaction, not a business transaction." '); *State Bank of Albany v. Roarke*, 91 A.D.2d 1093, 1095 (N.Y. 1983) (holding that the loan forms on their face state that the loan[s] were for business purposes, so the transactions were exempt from the Act).

"Additionally, Regulation Z, to which Roberts refers, includes an express exemption for business and commercial credit:

"This regulation does not apply to the following:

> (a) Business, commercial, agricultural, or organizational credit. (1) An extension of credit primarily for a business, commercial or agricultural purpose. 12 C.F.R. § 226.3

"Second, the Term Loan Agreement and Term Note D were entered into in 1991. Even if the Term Loan Agreement and Term Note D were not exempt from the Truth in Lending Act, the 1994 amendments to the Truth in Lending Act were enacted after those agreements were entered into between the parties and the Court has been presented with no authority that these amendments were retroactive.

"The Term Loan Agreement does not fall under HOEPA because Term Loan A was not secured by Roberts's residences in California and New York. Roberts's reliance on Trial Exhibit 16, a September 19, 1990 letter from Roberts to Palm's president Douglas O'Keefe dated September 19, 1990, is misplaced. Exhibit 16 related to another loan made by Palm to Roberts in the principal amount of $216,000 and not any loan made pursuant to the Term Loan Agreement.

"Roberts's residences in California and New York were never provided as collateral for any of the loans made pursuant to the Term Loan Agreement. The only security for the Term Loan Agreement was the personal property described in the Security Agreement attached to the Term Loan Agreement as Exhibit A, (Trial Exhibit 18A). No security interest was granted in any real property.

"Even if the Term Loan Agreement had been secured by Roberts's residences, the transaction would still be exempt from the Truth in Lending Act pursuant to 15 U.S.C. § 1603(1). The fact that a loan transaction results in a security interest in a debtor's residence does not subject a commercial loan to the Truth in Lending Act. *Toy National Bank of Sioux City v. McGarr*, 286 N.W.2d 376, 378 (Iowa 1979) (holding that even though a loan resulted in a security interest in the debtor's residence, the Act does not apply because it was a commercial loan, not a consumer loan); *Sherill v. Verde Capital Corp.*, 719 F.2d 364, 367 (11th Cir. 1983) ('The fact that the credit transaction between the parties was secured by a mortgage on the Plaintiffs' home does not transform the [commercial] loan from an exempted transaction to one within the ambit of the Act'); *Poe v. First Nat. Bank of DeKalb*

County, 597 F.2d 895, 896 (5th Cir. 1979) (holding that the courts look at the purpose of the loan to determine whether it is covered by the Act and securing a business loan with a home does not change the fact that a business loan is exempt from the Act); *Cit Financial Services, Inc. v. Bowler*, 537 So.2d 4, 5-6 (Ala. 1988) (holding that a loan secured with a mortgage on a home was a commercial loan and was, as a commercial loan, exempt from the Act)."

[¶] . . . [¶]

"The Court rejects Roberts's argument that Term Note D is barred by the four-year statute of limitations based on the fact that Palm admitted that the loan matured on April 19, 1994.

"This Court has previously ruled in its Statement of Decision that the 'partial payment of $2,500 on May 3, 2001 tolled the statute of limitations until May 3, 2001 pursuant to Code of Civil Procedure § 360.' See Trial Exhibit 61.

"Although the Complaint in this case was filed on May 23, 2005, beyond the expiration of the four year period, this Court has previously ruled that the statute has been tolled for more than 21 days. [¶] . . . [¶]

"Roberts urges the Court to invalidate the contracts as a contract of adhesion or as unconscionable. As such, he has the burden of proof. *See Brown v. Wells Fargo Bank, N.A.* (2008) 168 Cal.App.4th 938, 955 (unconscionability); *Ilkchooyi v. Best* (1995) 37 Cal.App.4th 395, 409 (unconscionability and adhesion).

"Civil Code § 1670.5 provides:

> "(a) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> "(b) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making

the determination.

"A court may not refuse to enforce a contract clause unless it determines the clause is both procedurally and substantively unconscionable. *Giuliano v. Inland Empire Personnel, Inc.* (2007) 149 Cal.App.4th 1276, 1292; *Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702, 714. The procedural element requires oppression, which occurs where a contract involves lack of negotiation and meaningful choice, or surprise, where the allegedly unconscionable provision is hidden within a prolix printed form, and the substantive element concerns whether a contractual provision reallocates risks in an objectively unreasonable or unexpected manner. *Jones v. Wells Fargo Bank* (2003) 112 Cal.App.4th 1527, 1539.

"In *Independent Ass'n of Mailbox Center Owners, Inc. v. Superior Court* (2005) 133 Cal.App.4th 396, 407, the evaluation of claims of procedural unconscionability . . . focuse[d] on unequal bargaining positions and hidden terms . . . (in the context of adhesion contracts). Substantive unconscionability claims traditionally involve contract terms that are so one-sided as to shock the conscience or that impose harsh or oppressive terms.

"In the instant matter, there was no evidence presented whereby the Court could make any finding of procedural unconscionability. A showing of oppression may be defeated if the complaining party, like Roberts herein, had reasonably available alternative sources of supply from which to obtain the desired goods or services free of the terms claimed to be unconscionable. *Dean Witter Reynolds, Inc. v. Superior Court* (1989) 211 Cal.App.3d 758, 768.

"In *Jones, supra* the court held that the note and loan agreement which required the repayment of principal, 10% interest, and a contingent interest of 50% of the appreciated value of certain property up to $750,000 was not unconscionable. Specifically, the court found that . . . there was no unconscionability because there was no evidence or alleged facts showing lack of choice, lack of negotiation, or surprise with regard to the note. *Id.* 112 Cal.4th 1540. Nor did the court find any facts that would 'shock the conscience.' *Id.*

"Roberts also presented no evidence to support a claim of substantive unconscionability. Roberts relies, to his detriment, on *Carboni v. Arrospide* (1991) 2 Cal.App.4th 76, in support of his contention that the Facility Fee is unconscionable as a matter

of law because of the amount provided for by the clear and unambiguous terms of the Term Loan Agreement and Term Note D.

"In *Carboni*, the Court held that a secured note providing for a rate of 200 percent per annum was unconscionable. The Court did not invalidate the agreement, but instead limited the agreement to an interest rate of 24% per annum. *Carboni* is clearly distinguishable.

"First, the *Carboni* Court found that procedural unconscionability existed because of inequality of bargaining power which effectively prevented the party from any meaningful choice. Second, the finding of unconscionability of a 200% interest rate was on a loan secured by real property, not conditional upon the success of the transaction herein.

"The *Carboni* Court stated that the 'procedural aspect of unconscionability refers to an absence of meaningful choice on the part of one of the parties which may be evidenced by (1) oppression, that is, an inequality of bargaining power resulting in an absence of meaningful choice, or (2) surprise, which occurs when the objectional term is hidden in the document.' No such conclusions can be reached based on the record in this case.

"As noted [*supra*], Palm's right to receive the Facility Fee in the amount of $1,250,000 was conditional upon two events: making a loan in the amount of $1,250,000 with an interest rate of 10% per annum and Roberts acquiring the two radio stations. Roberts, in negotiating and proposing those terms originally, noted that the radio stations were worth $10 million more than the purchase price of approximately $17 million, and he would achieve an immediate profit of $10 million.

"Furthermore, under the express terms of the Term Note D, Palm was not entitled to receive payment for the Facility Fee in the amount of $1,250,000 until the 'Maturity Date,' which was three years from the 'Commencement Date.' Under the terms of the agreement, the Commencement Date could have been as late as one year from the original date of Term Note D. As a result, Palm was not entitled to receive payment for the Facility Fee, if at all, until no earlier than three years and no later than four years.

"All of the other cases cited by Roberts involve instances where the Court, unlike here, found <u>both</u> procedural and substantive unconscionability. *See Harper v. Ultimo* (2003)

113 Cal.App.4th 1402, 1410 (arbitration clause[s] that unfairly limited damages in consumer contract[s] were substantively unconscionable and were not included with the form contract, resulting in procedural unconscionability); *Nagrampa v. Mailcoups, Inc.* (9th Cir. 2006) 469 F.3d 1257, 1293 (finding an arbitration clause in a franchise agreement was procedurally unconscionable because it was an adhesion contract that did not provide adequate notice and was substantive[ly] unconscionable because the requirements were unduly oppressive and harsh); *A&M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 490 (warranty disclaimer was procedurally and substantively unconscionable); *Truta v. Avis Rent a Car System, Inc.* (1987) 193 Cal.App.3d 802, 817-18 (allegations of both procedural and substantive unconscionability were sufficient to raise a colorable claim of unconscionability); *Dean Witter Reynolds, Inc. v. Superior Court* (1989) 211 Cal.App.3d 758, 771-72 (rejected unconscionability defense because party failed to show procedural unconscionability).

"Given the entire circumstances relating to this transaction, it cannot be reasonably concluded that enforcing the agreement pursuant to the negotiated terms 'shocks the conscience.' Furthermore, there is no evidence of 'oppression' or 'surprise' that can lead to the conclusion that procedural unconscionability existed in this case.

"Roberts also contends that a loan found to be unconscionable pursuant to Cal Civ. Code § 1670.5(a) constitutes a violation of Finance Code § 22302. For the reasons discussed above, Term Note D is not unconscionable and Finance Code § 22302 does not apply.

"Furthermore, a commercial loan is defined as a loan with a principal amount of more than $5,000 where the proceeds 'are intended by the borrower for use primarily for other than personal, family, or household purposes.' Cal. Fin. Code § 22502. Under the California Finance Lenders Law, certain provisions of the division apply to consumer loans and other provisions apply solely to commercial loans. Cal. Fin. Code § 22001(b), (c). The unconscionable contract provision to which Roberts cites is set forth in Chapter 2 of the California Finance Lenders Law. Cal. Fin. Code § 22302. However, Chapter 2 applies to only consumer loans and not to commercial loans. Cal. Fin. Code § 22001(c).

"Additionally, it is beyond dispute that Palm is exempt from the California usury laws. At all times relevant to this transaction, Palm was duly licensed in California as either a

Commercial Finance Lender or a Finance Lender. Trial Exhibit 1. California's prohibition against usury is found in Article [XV], Section 1 of the California Constitution. However, the usury restrictions do not apply to 'any other class of persons authorized by statute, or to any successor in interest to any loan or forbearance, exempted under this article. . . .' The California Finance Lenders Law exempts commercial lenders from the constitutional restrictions on interest. Cal. Fin. Code § 22002.

"Thus, Roberts's argument that the Term Loan Agreement and Term Note D were unconscionable or were adhesion contracts is contradicted as well as unsupported by case law, the facts of this case and the evidence presented."

The trial court then found Palm was entitled to recover attorney fees pursuant to the attorney fees provision in Term Note D and Civil Code section 1717, subdivision (a). The court ordered entry of judgment for Palm and against Roberts in the amount of $4,677,920.96 as of March 31, 2009, with interest accruing from that date until judgment is satisfied at the rate of $1,072.02 per day.

STANDARD OF REVIEW

The interpretation of a statute and the determination of its constitutionality are questions of law, and appellate courts apply a de novo standard of review. (*Bernardo v. Planned Parenthood Federation of America* (2004) 115 Cal.App.4th 322, 360.) Appellate courts examine independently the resolution of a pure question of law; scrutinize for substantial evidence the resolution of a pure question of fact; examine independently the resolution of a mixed question of law and fact that is predominantly legal; and scrutinize for substantial evidence the resolution of a mixed question of law and fact that is predominantly factual. (*People v. Waidla* (2000) 22 Cal.4th 690, 730.)

DISCUSSION

1. The Trial Court Did Not Err in Concluding the Complaint Was Timely

Roberts's contention that section 351 is unconstitutional presents a mixed question of law and fact that is predominantly legal, requiring our independent or de novo review. However, Roberts failed to provide any citations to the record to support any of the factual assertions as to what the record shows as required by California Rules of Court,

rule 8.204(a)(1)(C) ("Each brief must . . . [s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears").

We therefore need not consider Roberts's argument that the facts at trial did not demonstrate he was out of the State of California for 21 days or more during the limitations period for purposes having nothing to do with interstate commerce. (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979 [reviewing court may disregard contentions unsupported by citation to the record]; *Aguimatang v. California State Lottery* (1991) 234 Cal.App.3d 769, 796 [reviewing court may disregard evidentiary contentions unsupported by proper page citations to the record].) The failure to cite to the record, as required by rule 8.204 of the California Rules of Court, is not cured by Roberts's lengthy factual assertions in his brief or references to exhibits without record citations, because rule 8.204 requires a record citation for each factual reference. (*City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239.) If a party fails to support an argument with the necessary citations to the record, that argument is deemed to have been waived. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246.)

Therefore, we deem waived Roberts's argument that the evidence did not support the trial court's lengthy and thorough factual findings that Roberts was out of state for more than 21 days during the limitations period for purposes other than the facilitation of interstate commerce. Roberts does not dispute that the applicable statute of limitations is the four-year statute in Code of Civil Procedure section 337. Turning to the purely legal question whether the tolling rule of section 351 is unconstitutional, we find no reason to conclude this statute tolling the limitations period violated Roberts's right to travel in interstate commerce.

Before turning to the commerce clause argument, we deem Roberts's argument that section 351 deprived him of due process and equal protection or violated any claimed constitutional right to travel for purposes other than interstate commerce to be waived, because Roberts offers no legal authority or analysis whatsoever to support those contentions. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852 ["An appellant must provide an argument and legal authority to support his contentions. . . . It

is not our place to construct theories or arguments to undermine the judgment and defeat the presumption of correctness. When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived" (citation omitted)].)

Likewise, we deem waived Roberts's argument that section 351 should not toll the statute of limitations because he was readily subject to service of process both in California and while traveling outside the state, because Roberts offers no legal support or reasoned argument to support that argument either.

Palm has cited extensive authorities establishing that these waived contentions have been rejected by the courts, but we need not address Palm's authorities since the points are deemed waived.

In support of his argument that section 351 is unconstitutional, Roberts relies primarily on two commerce clause cases, *Abramson v. Brownstein* (9th Cir. 1990) 897 F.2d 389, and *Heritage Marketing & Ins. Services, Inc. v. Chrustawka* (2008) 160 Cal.App.4th 754. Neither case governs our decision here because both cases address the commerce clause implications of section 351 as applied to *nonresidents of California.* (*Abramson, supra,* at p. 392 [holding application of section 351 to a nonresident would violate the commerce clause, reasoning that although the nonresident defendants were subject to service under California's long-arm statute, section 351 denied them a statute of limitations defense unless they maintained a presence in California]; *Heritage Marketing,* at p. 759, *id.* at pp. 763-764 [following *Abramson* in case against defendants who moved from California and established residency in another state].)

Not only are these cases inapplicable here, where it is undisputed that Roberts is a California resident and has been at all relevant times, but the applicable authority establishes section 351 does not violate the commerce clause when applied to a defendant who is outside California for reasons unrelated to interstate commerce. The court in *Filet Menu, supra,* 71 Cal.App.4th 1276, found section 351 violates the commerce clause when applied to a resident who travels outside California for interstate business but not when applied to a resident who is out of state for reasons unrelated to interstate

commerce, because the tolling rule of section 351 does not burden interstate commerce in that instance.

The bifurcated trial was conducted to determine if Roberts had traveled outside California for purposes unrelated to interstate commerce for more than 21 days because of the holding in *Filet Menu*. Since Roberts was out of state for more than 21 days during the limitations period for purposes other than the facilitation of interstate commerce, we find that tolling the four-year statute of limitations for 21 days did not violate the commerce clause.

2. The Trial Court Did Not Err in Awarding Judgment for Palm on the Term Note

At the trial on the merits, Roberts asserted as affirmative defenses to the complaint and in a cross-complaint that the term note was unenforceable because it was a contract of adhesion, unconscionable, lacked consideration, violated the federal Truth in Lending Act, and was barred by the statute of limitations because the statute of limitations began to run on April 19, 1994, when the loan matured. As set forth above, the trial court considered and rejected each of these contentions.

Each of these contentions presents a mixed question of fact and law that is primarily factual and, as such, our review requires that we consider whether substantial evidence supports the trial court's rulings. (*People v. Waidla*, *supra*, 22 Cal.4th at p. 731.) The trial court made extensive factual findings that the term note was not unconscionable or a contract of adhesion; it was supported by adequate consideration; the requirements of the federal Truth in Lending Act did not apply because the loan was commercial and not a consumer loan; and Roberts made payments on the term loan through May 3, 2001, that extended the accrual of the statute of limitations until that date. We deem Roberts to have waived all of these arguments on appeal because he failed to support any of them with the necessary citations to the record. (*Nwosu v. Uba*, *supra*, 122 Cal.App.4th at p. 1246.) Nor are we persuaded the trial court erred in the legal analysis of any of these contentions.

Roberts does not challenge the trial court's calculation of the amount of the judgment nor the rate at which interest is to accrue daily, nor does he challenge the court's award of attorney fees in favor of Palm. On appeal, Palm requests an award of attorney fees, which we grant.

DISPOSITION

We affirm the judgment. Palm is to recover attorney fees and costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.